IN THE SUPREME COURT OF MISSOURI

Supreme Court No. 95658

BISHOP & ASSOCIATES, LLC., Plaintiff-Appellant,

VS.

AMEREN CORPORATION, et al., Defendants-Respondents.

BRIEF OF THE ST. LOUIS AND KANSAS CITY CHAPTERS OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF APPELLANT BISHOP & ASSOCIATES, LLC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
CONSENT OF PARTIES	1
STATEMENT OF FACTS	1
POINT RELIED ON	4
ARGUMENT	5
CONCLUSION	23
CERTIFICATE OF COMPLIANCE	24
CERTIFICATE OF SERVICE	24

TABLE OF AUTHORITIES

Cases

Anderson v. Marathon Petroleum, 801 F.2d 936 (7th Cir. 1986)16
Barlow v. C.R. England, 2013 U.S. Dist. LEXIS 104485
(D. Colo. July 25, 2013)
Bd. of County Comm'rs v. Umbehr, 518 U.S. 668 (1996)
Boyle v. Vista Eyewear, 700 S.W.2d 859 (Mo. App. 1985)6
Burgess v. Nacom Cable Co., 923 S.W.2d 450 (Mo. App. 1996)23
CFTC v. Dunn, 58 F.3d 50 (2d Cir. 1995)7
Farrow v. St. Francis Med. Ctr., 407 S.W.3d 579 (Mo. banc 2013)
Fleshner v. Pepose Vision, 304 S.W. 3d 81 (Mo. banc 2010)4, 5, 8, 11, 13
Fraser v. Nationwide Ins. Co., 352 F.3d 107 (3 rd Cir. 2003)19
Hayes v. Show Me Believers, 192 S.W.3d 706 (Mo. banc 2006)6
Harvey v. Care Initiatives, 634 N.W.2d 681 (Iowa 2001)
Keveney v. Missouri Military Acad., 304 S.W.3d 98 (Mo. banc 2013)4, 8, 13, 19
Kirk v. NCI Leasing, 2009 Kan. App. Unpub. LEXIS 190
(Kan. App. Jan 16, 2009)19
Morgan Drive Away v. Brandt, 479 N.E.2d 1336 (Ind. App. 1985)
Memphis Cmty. School Dist. v. Stachura, 477 U.S. 299 (1986)20
New Horizons v. Clarion, 561 N.E.2d 283 (III. App. 1990)

O'Hare Truck Service v. Northlake, 518 U.S. 712 (1996)
Ostrander v. Farm Bureau Ins. Co., 851 P.2d 946 (Idaho 1993)20
Power v. Summers, 226 F.3d 815 (7th Cir. 2000)15
Rosenfeld v. Thirteenth Street Corp., 1989 Okla. LEXIS 105
(Okla. June 13, 1989)19
Rivero v. Francisco, 316 F.3d 857 (9th Cir. 2002)20
Other Authorities
U.S. Government Accounting Office, Contingent Workforce: Size,
Characteristics, Earnings and Benefits, (April 20, 2015), available at
www.gao.gov/products/GAO-15-168R10, 12
Eisenach, The Role of Independent Contractors in the U.S. Economy (Navigant
Economics 2010), available at http://ssrn.com/abstract=1717932
Bernt, Wrongful Discharge of Independent Contractors, 19 Yale L. & Policy
Rev. 39 (2000)14, 16, 22
Coley, Contracts, Custom, and the Common Law, 24 BYU J. Pub. L. 193
(2010)
Cohen and Eimicke, Independent Contracting: Policy and Management Analysis,
(Columbia Univ. 2013), available at www.columbia.edu/~sc32/documents/
IC Study Published PDF 22

STATEMENT OF INTEREST

Amici Curiae, the St. Louis and Kansas City Chapters of the National Employment Lawyers Association, are voluntary membership organizations of approximately 175 lawyers who represent employees in labor, employment and civil rights disputes in the state of Missouri. The Chapters are affiliates of the National Employment Lawyers Association (NELA) which consists of more than 3,000 attorneys who specialize in representing individuals in controversies arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous amicus curiae briefs in state and federal courts across the country regarding the proper interpretation and application of workplace laws to ensure that they are fully enforced and that the rights of workers are fully protected. Members of the St. Louis and Kansas City Chapters of NELA regularly represent victims of unlawful retaliatory discharge.

CONSENT OF PARTIES

Pursuant to Supreme Court Rule 84.05(f)(2), this brief of Amicus Curiae is filed with the consent of all the parties.

STATEMENT OF FACTS

Plaintiff Bishop & Associates is a small plumbing contractor. For eight years it provided plumbing services to Ameren, a large power company, pursuant to a contract that was terminable at will (L.F. 000425-29; L.F. 000689). During

he last years of its business relationship with Ameren, B&A devoted nearly 100% of its time to servicing it and earned as much as \$600,000 in annual revenue from it (L.F. 001065; L.F. 000759).

During the course of its work for Ameren, B&A sometimes detected impending or existing violations of state and federal environmental laws and regulations. These included improper cross-connections between waste systems and drinking water systems as well as the leaking of oil on to and out of the company's property (L.F. 000914; L.F. 000940; L.F. 000337; L.F. 000946; L.F. 00092, 1001; L.F. 001129-1132). When it observed threatened or actual violations of regulatory requirements, B&A reported them to Ameren. If it had the capacity to prevent or correct them, it sought authorization to do so; if it did not, it nevertheless reported them, since they created hazardous conditions (L.F. 000462-474; L.F. 000895-901; L.F. 000412; L.F. 0010634).

Over time, with a change in its personnel and an enhanced commitment to cutting costs, Ameren became increasingly resistant to, indeed hostile to, B&A's efforts to ensure compliance with environmental laws and regulations (L.F. 001071; L.F. 001249). When B&A persisted in reporting the problems to company officials, including the Chief Executive Officer, Ameren summarily terminated its contract with it (L.F. 000931-943; L.F. 001189; L.F. 001146-47; L.F. 000788; L.F. 001160-1161).

Plaintiff B&A brought this lawsuit against Defendant Ameren alleging, among other things, a tort claim of wrongful termination in violation of public policy. The trial judge entered summary judgment against B&A on the ground that the tort protects employees, but not independent contractors, from retaliation for reporting the unlawful conduct of the businesses they serve. The Court of Appeals affirmed in an unpublished opinion. B&A filed an application for transfer of the case to the Supreme Court, which was granted.

POINT RELIED ON

The Trial Court Erred in Granting Summary Judgment Against Plaintiff on its Tort Claim of Wrongful Termination in Violation of Public Policy Because, as a Matter of Law, the Tort Protects Independent Contractors as well as Employees from Retaliation for Whistleblowing

Fleshner v. Pepose Vision, 304 S.W.3d 81 (Mo. banc 2010)

Keveney v. Missouri Military Acad., 304 S.W.3d 98 (Mo. banc 2013)

Bd. of County Comm'rs v. Umbehr, 518 U.S. 668 (1996)

O'Hare Truck Service v. Northlake, 518 U.S. 712 (1996)

ARGUMENT

The Trial Court Erred in Granting Summary Judgment Against Plaintiff on its Tort Claim of Wrongful Termination in Violation of Public Policy Because, as a Matter of Law, the Tort Protects Independent Contractors as well as Employees from Retaliation for Whistleblowing

This case raises an important question of first impression in Missouri: can independent contractors bring suit under the tort of wrongful termination in violation of public policy? This Court has previously held that employees are protected from retaliation from reporting the unlawful conduct of the businesses that hire them. *Fleshner v. Pepose Vision*, 304 S.W. 3d 81, 92 (Mo. banc 2010). Are independent contractors also protected from retaliation for reporting the unlawful conduct of the businesses that hire them? The answer must be yes because there are no material differences between employees and independent contractors in terms of the underlying purposes of the public policy tort. In addition, well-reasoned case law from outside Missouri supports extending coverage to independent contractors.

There is a preliminary matter. Defendant Ameren has argued that this Court's decision in *Farrow v. St. Francis Med. Ctr.*, 407 S.W.3d 579 (Mo. banc 2013), compels the conclusion that whistleblower protection runs to employees but not to independent contractors. But this is reading too much into *Farrow*.

The Court in *Farrow* did not have before it, and therefore did not address or decide, the question of whether independent contractors can sue their principals under the public policy tort. Instead, it dealt with the separate and distinct question of whether employees can bring suit against individual managers, rather than their employers, under the tort. In one paragraph of a lengthy opinion the Court held that they cannot and stated in one sentence, without any elaboration, that the reason they cannot is that the tort "requires an employer/employee relationship." *Farrow*, 407 S.W.3d 579. According to Ameren, this statement is binding on the Court as a matter of stare decisis and bars it from recognizing a cause of action in favor of independent contractors because, by definition, they are not employees of the businesses that hire them.

The argument reflects a misunderstanding of stare decisis. An appellate court is always free to narrow its reasoning in a prior case as long as it was not essential to the outcome of it. *Hayes v. Show Me Believers*, 192 S.W.3d 706, 707 (Mo. banc 2006); *Boyle v. Vista Eyewear*, 700 S.W.2d 859, 865 (Mo. App. 1985). This is a concession to the reality that appellate judges are not omniscient. They cannot always foresee how the broad reasoning they employ in one case with certain facts may become unwarranted in a subsequent case with completely different facts. When the problem surfaces they do not alter the outcome in the prior case but instead narrow its reasoning to accommodate the new factual

multitudinous. [They include] the earlier court's use of overbroad language inadvertently encompassing the issue in the present case . . . [and] the later court's disagreement with the earlier court's analysis as opposed to outcome." Richard Posner, The Problems of Jurisprudence 96-97 (Harvard Univ. Press 1990); see also *CFTC v. Dunn*, 58 F.3d 50, 53-54 (2d Cir. 1995).

Here, the Court in *Farrow* rested its decision that employees cannot sue individual managers on the broad ground that an employer-employee relationship must exist. But this ground was not *essential* to its ruling. The Court could have rested its decision on the narrower ground that employees cannot sue individual managers because they do not have a direct business relationship with them and, as such, do not need to sue them because they have an adequate remedy against their employers, with whom they do have a direct business relationship. The Court in this case is entitled to limit *Farrow* to this narrower ground and proceed to hold that independent contractors have a remedy under the public policy tort. This follows from the fact that independent contractors have a direct business relationship with their hiring entities and, if not allowed to sue them, would be effectively left without any remedy at all for the wrongs done to them.

Determining whether the tort of retaliatory termination in violation of public policy applies to independent contractors as well as employees requires careful

attention to its rationale. This stands to reason, since the contours of a cause of action are shaped by its goals -- by the mischief to be prevented and the end to be achieved.

The public policy tort is rooted in the recognition that people are painaverse. They are reluctant to report the illegal conduct of businesses, which we want to be reported so that it can be remedied, when those businesses have the power to retaliate against them by inflicting economic or other harm on them. Recognizing a cause of action in tort is necessary to encourage whistleblowers to bring wrongdoing to light secure in the knowledge that if they do, and they suffer reprisal for it, they will be able to recover compensatory and punitive damages against the culpable business. *Fleshner*, 304 S.W.3d at 93-96; *Keveney v. Mo. Military Academy*, 304 S.W.3d 98, 102-103 (Mo. banc 2010).

This rationale for the public policy tort is equally engaged whether the victim of retaliation is an employee or an independent contractor. Just as employees are well-positioned to observe corrupt and abusive practices by businesses so, too, are independent contractors. Just as employees are vulnerable to economic loss from the retaliatory termination of their jobs so, too, are independent contractors from the retaliatory termination of their contracts. There is no principled basis for holding that employees are protected by the tort but independent contractors are not. Indeed, such a holding would create a strange and

counterintuitive dichotomy: businesses would have an incentive to refrain from retaliating against their whistleblowing employees but not against their whistleblowing independent contractors, who they could punish with impunity. Such a result would work a betrayal of the objectives of the public policy tort.

Concrete examples bring this point into sharp focus. Consider these factual scenarios, all of which involve independent contractors.

- The plaintiff is a small business that provides security services to an airport. It calls attention to the airport's failure to comply with passenger screening procedures mandated by the regulations of the Transportation Security Administration. As a result, the airport terminates its contract with the firm.
- The plaintiff is the owner of a tractor trailer who contracts with a trucking company to deliver cargo for its customers. When he reports that the company requires its drivers to use trucks with faulty brakes, his contract is terminated.
- The plaintiff is an accountant who provides as-needed services
 to a corporation, particularly during tax season. He detects
 serious accounting fraud and tax evasion, which he reports.
 Thereafter, the corporation terminates his contract in retaliation
 for his report.

- Most hospitals outsource their emergency physician services.

 The plaintiff, who is a doctor in the emergency room of a hospital, witnesses numerous violations of the patient confidentiality provisions of the Health Insurance Portability and Accountability Act (HIPAA). She blows the whistle on the hospital. It reacts by terminating her contract with it.
- The plaintiff is a small firm which provides maintenance services at an industrial plant. When it reports the company's failure to repair dangerous gas leaks, its contract is terminated.

Denying the independent contractors in these scenarios relief under the public policy tort will generate the very evil it was designed to prevent: the sanctioning of lawlessness and the suppression of reports about it. Fear of retaliation will deter independent contractors from speaking out against violations of law which will remain cloaked in secrecy -- unreported and uncorrected.

Such a result is particularly unsettling in light of the fact that independent contractors form a substantial and growing part of the U.S. economy. They comprised 6.7% of the workforce in 1995, 7.4% of the workforce in 2005, and an estimated 12.9% if the workforce in 2010. <u>See</u> U.S. Government Accounting Office, <u>Contingent Workforce</u>: <u>Size</u>, <u>Characteristics</u>, <u>Earnings and Benefits</u> at 11-12 (April 20, 2015), available at www.gao.gov/products/GAO-15-168R. Giving

businesses carte blanche to terminate the services of their independent contractors in order to get back at them for opposing and exposing their unlawful practices would effectively create a law-free zone in a substantial segment of the Missouri workforce.

All these considerations sweep to the conclusion that independent contractors have the same right as employees to pursue a tort claim when businesses retaliate against them for reporting their unlawful conduct.

No answer is it to say, as Ameren has, that the tort is "narrow." This Court has emphasized that it is "not static" and warned against giving it a "too narrow" interpretation. *Fleshner*, 304 S.W.3d at 92, 96. Extending whistleblower protection from employees to independent contractors is a logical and modest step that is necessary to bring the cause of action into alignment with its core purposes.

Defendant Ameren has put forward four reasons why independent contractors are different from employees and, as a result, should be denied the remedy afforded to employees under the tort of retaliatory termination. All of these reasons, however, evaporate under scrutiny.

First, Defendant has contended that independent contractors have more bargaining power than employees and therefore can negotiate provisions in their contracts with hiring businesses that forbid arbitrary termination of them.

Independent contractors will not hesitate to report the wrongdoing of hiring

businesses, Ameren has suggested, because they will know that if they do, and their contracts are terminated in retaliation for it, they will have a breach of contract remedy against the businesses.

So the argument goes, but it goes nowhere. If independent contractors had significant bargaining power they would be able to routinely negotiate job security provisions in the contracts they make with their principals. Yet they almost never do. Almost always, the contract provides that the independent contractor can be terminated at will, without cause, upon notice measured in days or weeks. See, e.g., Harvey v. Care Initiatives, 634 N.W.2d 681, 682 (Iowa 2001); Morgan Drive Away v. Brandt, 479 N.E.2d 1336, 1338 (Ind. App. 1985). The present case is typical. B&A had a long-term business relationship with Ameren which was virtually exclusive in nature. Despite this, its contract could be terminated without cause -- without notice even.

Furthermore, one would expect that if independent contractors had more bargaining power than employees they would feel more secure in their jobs. Yet they feel *less* secure. In the recent GAO study cited earlier in this brief, 25.7% of independent contractors reported the likelihood that they would lose their job in the coming year while only 9.6% of regular employees did. <u>See Contingent</u> Workforce: Size, Characteristics, Earnings, and Benefits at 21.

Even if one indulges the fiction that independent contractors are better able

than employees to negotiate job security provisions it would not make any difference. This Court has expressly held that employees with such provisions can nonetheless bring suit under the public policy tort, rightly characterizing as "erroneous" the idea that the availability of a breach of contract remedy is sufficient to protect them. *Keveney*, 304 S.W.3d at 103. Like employees, independent contractors must be allowed to seek and recover emotional distress damages and punitive damages against wrongdoers (available in tort actions but not in contract actions) in order to fully and completely vindicate Missouri public policy. Id.; *Fleshner*, 304 S.W.3d at 95-96.

Second, Defendant has contended that independent contractors do not need protection from retaliatory termination of their contracts because they can move on to other work with other businesses without significant loss of income. But the same is true of some employees who can move on to other jobs with other employers without significant loss of income. *O'Hare Truck Service v. Northlake*, 518 U.S. 712, 723 (1996).

There is a deeper point. The economic losses suffered by independent contractors will not always be small; they will often be large. One need look no further than this case. B&A had a valuable contract with Ameren to provide it with plumbing services which generated almost 100% of its revenue. The cancellation of the contract caused it to lose hundreds of thousands of dollars per

year.

To be sure, the financial harm suffered by other independent contractors may be more modest. But it does not follow that they should be denied compensation for it. Nor does it follow that independent contractors, as a class, should be denied a cause of action for retaliatory termination of their contracts just because the damages of some of them may be relatively small. Many breaches of contracts (probably most of them) produce small economic losses. Yet they are still compensable. Nobody would say that the commonplace occurrence of such losses means that all contract actions should be barred.

No significance can be attached to the fact, emphasized by Ameren, that B&A is a firm rather than an individual. As just noted, B&A has incurred substantial damages in this case. Moreover, the vast majority of independent contractors are individuals, not firms, and the vast majority of those which are firms are tiny, with five or fewer employees. See Eisenach, The Role of Independent Contractors in the U.S. Economy at 36 (Navigant Economics 2010), available at http://ssrn.com/abstract=1717932. B&A is typical in this regard because it performed most of its plumbing services with only two employees.

The main problem with Defendant's argument is that it is unrealistic about human nature. As pointed out, people are keenly interested in avoiding harm to themselves. Independent contractors will think twice about charging their

principals with unlawful conduct, which invites retaliation, and may remain silent about it in order to avoid the loss of a stream of income. It does not matter whether the income is measured in hundreds of dollars, thousands of dollars, tens of thousands of dollars or, as in the present case, hundreds of thousands of dollars. There is a real risk that they will engage in self-censorship. "We cannot say as a matter of law that denying a raise of several hundred dollars as punishment for speaking out is unlikely to deter the exercise of free speech." *Power v. Summers*, 226 F.3d 815, 821 (7th Cir. 2000).

There are practical, as well as legal, objections to Ameren's position. It implies that trial courts will have to evaluate whether independent contractors are, or are not, financially dependent on their contracts with hiring businesses in order to determine whether they do, or do not, have a legal remedy against them.

But this would be a quixotic venture. There are infinite gradations of economic reliance by independent contractors on their principals. No objective yardstick exists that would allow courts to clearly and consistently distinguish between independent contractors based on the degree to which they can, or cannot, absorb the loss of their contracts with hiring entities. Such an eye-of-the-beholder approach would add murk not clarity to the law; it would generate considerable collateral litigation and associated uncertainty as trial courts struggle to fix a nebulous, and probably non-existent, boundary between financial dependence and

financial independence. It would be unwise, not to mention unfair, to impose this burden on the trial courts. *O'Hare Truck Service*, 518 U.S. at 722-723.

What is needed is a general rule that allows independent contractors, as a class, to bring whistleblower claims. There may of course be exceptions. An independent contractor might not have a valid claim if the law that it (or more likely he or she) invokes as a source of public policy is expressly intended to protect employees but not independent contractors. Bernt, Wrongful Discharge of Independent Contractors, 19 Yale L. & Policy Rev. 39, 56 (2000) (arguing that a cause of action should be recognized in favor of independent contractors). But the exceptions to the general rule must be narrow and well-defined.

Third, Defendant has contended, or at least the lower courts in this case have, that whistleblower protection should not extend to independent contractors because they, unlike employees, have the right to control how their work is performed.

This is a sterile and inconsequential observation. The fact that a business does not control the work of its independent contractors may be a good reason for saying that it should not be held vicariously liable for their torts. *Anderson v. Marathon Petroleum*, 801 F.2d 936, 938 (7th Cir. 1986). But it is not a good reason for saying that the business should not be directly liable for its own torts. What matters is not whether the hiring entity has the power to control the work of its

independent contractors but whether it has the power to refrain from retaliating against them by terminating their contracts because they have called attention to its misdeeds and misdoings. Clearly it does.

Fourth, and finally, Defendant falls back on the idea that allowing wrongful termination claims might lead to abusive conduct by independent contractors. They might seek to expand the scope of their work by pointing to non-existent violations of laws and then threatening to report the alleged violations unless the hiring party agrees to authorize them to do the work.

This is alarmism not realism. There is no evidence, as opposed to speculation, that independent contractors have sought to manipulate their principals in this manner. Even if there were such evidence, however, it would not make any difference. The mere fact that a cause of action can be abused is hardly a proper ground for banning it altogether. Rights abused are still rights -- and must be available to those who, like Plaintiff B&A, have not abused them. Missouri courts are capable of distinguishing between proper and improper whistleblower claims.

Defendant Ameren has made much of the fact that the majority of jurisdictions to consider the issue have held that independent contractors do not have a cause of action for wrongful termination in violation of public policy. But this is not saying much for several reasons.

One is that at least 43 states have recognized the public policy tort. <u>See</u> Coley, <u>Contracts, Custom, and the Common Law, 24 BYU J. Pub. L. 193, 205 (2010). Yet only a small fraction of them, about nine of them, have decided whether independent contractors have a remedy under it. Most states, including Missouri, have yet to weigh in on the issue.</u>

More fundamentally, the cases that place independent contractors outside the protection of the public policy tort are unreasoned or poorly reasoned. As such, they lack the power to persuade.

Most of the cases contain no reasoning at all. One typical case states, without amplification, that "Here, plaintiff is not an employee but an independent contractor. We hold, therefore, that plaintiff cannot assert a claim of retaliatory discharge." *New Horizons v. Clarion*, 561 N.E.2d 283, 285 (Ill. App. 1990). Other cases are equally terse, leading one court to complain that their conclusions are "rarely explained" and that their analyses "lack depth." *Barlow v. C.R. England*, 2013 U.S. Dist. LEXIS 104485 at *10 (D. Colo. July 25, 2013). Judicial decisions are justified, not by their results, but by their reasoning. Yet there is none in most of the cases relied upon by Ameren.

There is reasoning in a few of the cases but it is bad reasoning. It rests on two ideas: (1) that independent contractors, unlike employees, have control over the way they perform their work and (2) that independent contractors, unlike employees, possess significant bargaining power. See, e.g., *Harvey*, 634 N.W.2d at 684. As discussed, however, the first proposition is utterly irrelevant and the second proposition is empirically untrue and, under *Keveney*, legally irrelevant as well. There is a thinness and shallowness to the cases cited by Ameren that give them an almost frivolous coloring.

Some of the out-of-state cases are more reasonable. They have been willing to assume, without deciding, that a tort remedy is available to independent contractors whose contracts are terminated for exposing wrongdoing. See, e.g., Fraser v. Nationwide Ins. Co., 352 F.3d 107, 111 (3rd Cir. 2003) (Pennsylvania law); Kirk v. NCI Leasing, 2009 Kan. App. Unpub. LEXIS 190 at *13 (Kan. App. Jan 16, 2009). The Supreme Court of Oklahoma has gone further. It has made it unmistakably clear that it would recognize a cause of action in favor of independent contractors in a case that, unlike the one before it, squarely presented the issue. Rosenfeld v. Thirteenth Street Corp., 1989 Okla. LEXIS 105 at *13 n.2 (Okla. June 13, 1989).

Particularly noteworthy is the dissenting opinion in one of the cases relied upon by Ameren. It is perceptive and penetrative. Among other things, the dissenting judge pertinently asked: "Why should we allow an independent contractor to be terminated for reasons which would be void for public policy if s/he were an employee?" *Ostrander v. Farm Bureau Ins. Co.*, 851 P.2d 946,

951(Idaho 1993) (Bistline, J., dissenting). Why indeed.

There is another body of case law, unrecognized and unacknowledged by Ameren, that works against its position. It is found in an analogous area of the law and supports extending whistleblower protection from employees to independent contractors.

Section 1983 is the federal law that creates a species of tort liability for violations of civil rights. *Memphis Cmty. School Dist. v. Stachura*, 477 U.S. 299, 305-306 (1986). Among other things, it authorizes whistleblower claims brought by government employees who are terminated from their jobs in retaliation for their exercise of freedom of speech. *Rivero v. Francisco*, 316 F.3d 857, 866 (9th Cir. 2002). There are close parallels between whistleblower claims brought under Section 1983 and the common law of Missouri; they both sound in tort and they both protect employees from reprisal for voicing taboo truths about the wrongdoing of their employers. Given this affinity, Section 1983 cases furnish a proper guide to decision in this case.

Twenty years ago, the U.S. Supreme Court addressed the question of whether the protection afforded employees from retaliation for their free speech extends to independent contractors as well. Significantly, it held that it does, blotting out any meaningful distinction between traditional employees and independent contractors for purposes of whistleblower claims against the

government. Bd. of County Comm'rs v. Umbehr, 518 U.S. 668 (1996).

The Court's opinion in *Umbehr* is brimming with insights that are relevant here. Among other things, the Court observed that (1) the similarities between independent contractors and employees are "obvious"; (2) independent contractors, like employees, are often in the "best position" to witness and report wrongdoing; (3) the threat of the loss of a valuable financial benefit, be it a contract for an independent contractor or a job for a regular employee, can deter whistleblowing; (4) the fact that some independent contractors may be less financially dependent on their contracts than some employees are on their jobs does not warrant denying a cause of action to all independent contractors; (5) the distinction between independent contractors and employees is a "poor proxy for the interests at stake" in retaliation cases; (6) authorizing independent contractors as well as employees to bring whistleblower claims is unlikely to lead to excessive or abusive litigation; and (7) such authorization is not an "extension" of the law but rather a refusal to recognize a "special exception" to the law's general ban on retaliation. Umbehr, 518 U.S. at 674, 678-681, 684.

Everything that was said in *Umbehr* can be carried over to this case. Indeed, if there is one case this Court should read it is *Umbehr* (and its companion case, *O'Hare Truck Service, supra*) because it provides a coherent and informed roadmap to the proper resolution of the case before it.

There remains to be discussed another strand of the analysis in *Umbehr*. The Supreme Court expressed concern that if it left independent contractors unprotected from retaliation it would encourage the government to manipulate the status of its workers, classifying more of them as independent contractors rather than employees in order to avoid liability for retaliation claims. *Umbehr*, 518 U.S. at 679.

This is a well-founded concern not only in the public sector but in the private sector as well Businesses have a financial incentive to classify their workers as independent contractors rather than employees because, if they do, they will not have to make Social Security or Medicare contributions or pay workers' compensation or unemployment compensation premiums. In addition, the workers will not covered by protective labor legislation, such as the minimum wage/overtime laws and the anti-discrimination laws. See generally Bernt, *supra*, at 57.

Many businesses have classified their workers as independent contractors when in reality they are employees. This is a serious problem; it has been estimated that upwards of 15% of workers are misclassified. See Cohen and Eimicke, Independent Contracting: Policy and Management Analysis at 44 (Columbia Univ. 2013), available at www.columbia.edu/~sc32/documents/IC_Study_Published.PDF. So widespread is the problem of misclassification of

workers that, in recent years, at least 37 states have enacted legislation to combat it, including Missouri. <u>Id</u>. at 51; §285.500 <u>et seq</u>. R.S.Mo.; <u>see also Burgess v. Nacom Cable Co.</u>, 923 S.W.2d 450, 454 n.2 (Mo. App. 1996).

If businesses are left free to retaliate against independent contractors for reporting their unlawful activity they will have an additional incentive, beyond those they already have, to classify their workers as independent contractors rather than employees in order to avoid tort liability. This will lead to more, not less, retaliation against whistleblowers because more of them will be independent contractors who businesses know they can target with adverse action without incurring any penalty. To accept such a result would require a complete disregard of Missouri public policy.

CONCLUSION

Vindicating the public policy of Missouri, and protecting those who have furthered it by reporting violations of the law, is too important to be defeated by empty distinctions between independent contractors and employees. For the reasons that have been explained, the Court should reinstate Plaintiff B&A's lawsuit and return it to the trial court for further proceedings.

/s/ John D. Lynn

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Certificate of Compliance

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements of Rule 84.06. The entire brief contains 5,500 words.

/s/ John D. Lynn

John D. Lynn

Certificate of Service

The undersigned certifies that a true and correct copy of this brief was filed electronically with the Court on this 13th day of July 2016 and served by operation of the Missouri E-Filing System upon each attorney of record.

/s/ John D. Lynn

John D. Lynn